FILED
AUG 10 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 235

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

vs.

ROSA CHARLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWARD R. ADAMS,
HERBERT C. DE YOUNG,
CHARLES F. WHITE,
Attorneys for Petitioner.

THE BLAKEMORE-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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Petitioner, Norfolk & Western Railway Company, defendant, appellee in the court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 12, 1951, reversing the judgment of the United States District Court for the Northern District of Illinois and remanding the case to that court with directions to grant respondent (plaintiff, appellant below) a new trial (R. 286).

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported in 188 Fed. 2d at 691.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit became final upon the denial of the petition of petitioner for a rehearing on May 17, 1951 (R. 288). This petition is filed within ninety days from said date as provided by 28 U. S. C., Section 2101(c). The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether an order denying a new trial may be reviewed by this Court or a court of appeals.

2. Whether an order denying a motion for a new trial may be reviewed by this Court or a court of appeals where no motion for a directed verdict was made in the District Court by the losing party and where the court of appeals holds that such party cannot accordingly question the sufficiency of the evidence supporting the judgment appealed from.

3. Whether this Court or a court of appeals on an appeal from a judgment in favor of the defendant entered on a verdict of not guilty where no motion for a directed verdict was made by the plaintiff, may exercise the discretion possessed by a trial judge, reverse an order denying a new trial and remand the case with directions to grant a new trial.

4. Whether this Court or a court of appeals may review an order denying a new trial where there has been no abuse of discretion by the trial court in overruling such motion and where no error of law appears in the trial court's rulings.

5. Whether this Court or a court of appeals, in view of the Seventh Amendment to the Federal Constitution, can

re-examine the verdict of a jury otherwise than according to the rules of the common law and reverse the judgment solely for alleged error of fact in the verdict and for alleged error of the District Court in overruling plaintiff's motion for a new trial.

STATEMENT.

On February 4, 1944, plaintiff purchased a ticket at the Central Station, Chicago, for passage to Petersburg, Virginia, to visit her husband, who was stationed at Camp Lee, Virginia. She traveled from Chicago to Cincinnati, Ohio, over another line. At Cincinnati she could not procure sleeping car accommodations and gave a redcap a tip to take her and her baggage through a side door so that she could get on the train of the defendant before the crowd waiting to board the train (R. 31-33). The train in question ran from Cincinnati, Ohio, to Norfolk, Virginia; there were three crews on that run and the occurrence out of which this action arises took place while the crew which went from Williamson, West Virginia, to Roanoke, Virginia, was in charge of the train (R. 120-21). Plaintiff, a colored person, rode in a coach where she was the only colored passenger (R. 127, 202). Shortly before the train reached the Virginia line, the front brakeman twice requested the plaintiff to move forward to a coach with like conveniences reserved for colored persons in compliance with the Virginia statute requiring segregation of white and colored passengers and the regulations of the defendant promulgated pursuant thereto (R. 192, 194). The brakeman again asked plaintiff to move after the train was in Virginia (R. 201, 202). The conductor on defendant's train also asked plaintiff to move (R. 125). She refused and kept her seat. At Christiansburg, 25 miles west of Roanoke, the conductor wired ahead to the super-

intendent, station master and special officer at Roanoke (R. 129).

A special officer appointed by a Virginia court boarded the train at Roanoke and was shown to the car where plaintiff was riding (R. 210, 211, 213). He exhibited his badge to plaintiff and asked her to move to the car reserved for colored persons, explaining the provisions of the Virginia statute and the regulations. She still refused (R. 213, 214). He went to pick up her coat to hand it to the porter, whereupon she slapped him in the face and said, "Leave that damn coat alone." He then secured the assistance of a military policeman who was in the car and plaintiff was removed from the train (R. 214). She was then taken in the Roanoke police patrol wagon over to police headquarters where she was booked on charges of violating Section 3983 of the Virginia Code and disorderly conduct (R. 159). This took place on a Saturday after the adjournment of court and she was released on bond sometime that evening (R. 181, 182, 41). She then proceeded to Petersburg, Virginia, and returned to Roanoke with her husband on the following Monday, where a trial was had in the afternoon (R. 42, 43, 44). Plaintiff was found guilty of disorderly conduct and fined $5.00 and costs amounting to $6.50, all of which she paid (R. 105).

Plaintiff instituted this action for damages in the Circuit Court of Cook County, Illinois, and on the petition of the defendant the case was removed to the United States District Court for the Northern District of Illinois, Eastern Division, at Chicago (R. 7). A jury trial was had and a verdict of not guilty was returned (R. 258). Plaintiff's motion for a new trial was overruled (R. 262). She appealed to the United States Court of Appeals for the Seventh Circuit and that court reversed the judgment of the District Court and remanded the case to that Court with directions to grant her a new trial (R. 286).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In reviewing the order of the District Court denying plaintiff's motion for a new trial.

(2) In holding that it could review the order of the District Court denying plaintiff a new trial, when plaintiff had made no motion for a directed verdict and therefore was not in a position to deny that the judgment appealed from was supported by substantial evidence.

(3) In holding that it could review the order of the District Court denying the motion of the plaintiff for a new trial when there had been no abuse of discretion by the District Court in overruling such motion and no error of law made by the District Court in its rulings at the trial.

(4) In holding that it could review the order of the District Court denying the motion of the plaintiff for a new trial for alleged error of fact.

(5) In holding that it could review the order of the District Court denying plaintiff's motion for a new trial when there had been no failure by the District Court to consider said motion nor any matter appropriate to a decision on said motion.

(6) In reversing the judgment of the District Court and remanding the case to that Court with directions to grant plaintiff a new trial.

REASONS FOR GRANTING THE WRIT.

For decades, even for more than a century, this Court has held that no appeal lies from an order overruling a motion for new trial. The several courts of appeal have likewise held that an order overruling a motion for a new

trial is not appealable. In a few instances courts of appeal have recognized exceptions on grounds hereinafter discussed. In the instant case we submit that the decision of the United States Court of Appeals for the Seventh Circuit awarding plaintiff a new trial does not fall within any of the exceptions heretofore recognized, is in conflict with prior decisions of this Court and those of courts of appeal in the several circuits, and charts a hitherto untrodden course in the field of appellate procedure. In none of the decided cases does it appear that this Court or a court of appeals reviewed an order overruling a motion for a new trial where the losing party had failed to make a motion for a directed verdict and therefore was not in a position to assert that the judgment appealed from was not supported by substantial evidence. The question presented should be settled by this Court.

(1) An order overruling a motion for a new trial is neither appealable nor reviewable. The only exceptions recognized are that the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion; that the trial court acted on the mistaken view that there was no jurisdiction to grant a new trial or that there was no authority to grant it on the ground advanced, and lastly that in denying the motion for a new trial, the trial judge was guilty of an abuse of discretion analogous to an error of law.

(2) The decision of the Court of Appeals in the instant case does not come within any of the exceptions on which the decided cases rest, because there was no abuse of discretion by the trial court, there was no error of law in his rulings on the instructions or any other matter and the trial court did not exclude from consideration any matters appropriate to a decision on the motion.

(3) In granting a new trial the Court of Appeals did

by indirection what it could not do directly because it could not consider whether the evidence was sufficient to support the judgment in favor of the defendant because plaintiff had made no motion for a directed verdict. The Court of Appeals has in effect obliterated the rule that a party on appeal may not challenge the sufficiency of the evidence to support the verdict against him where he made no motion for a directed verdict.

(4) The cases cited by the Court of Appeals in its opinion do not support the conclusion which it reached.

ARGUMENT.

SUMMARY OF ARGUMENT.

For more than a century this Court has held that an order overruling a motion for new trial is not appealable. In reaching this conclusion the basic reason advanced is that whether a verdict of a jury is erroneous is a question of fact, and therefore not reviewable by this Court on constitutional grounds. In other cases the reason presented is that the allowance or denial of a motion for new trial calls for the exercise of discretion by the trial judge and is accordingly not reviewable. The principal exceptions to this rule are found largely in cases decided by the several courts of appeal wherein a trial judge excluded from consideration matters appropriate to a decision on the motion or refused to consider such a motion under the mistaken view that he had no jurisdiction.

In the instant case the defendant contends that the record shows that the trial judge gave conscientious and careful consideration to plaintiff's motion for a new trial and certainly was not guilty of any abuse of discretion; that even if the Court of Appeals took a different view of the evidence than the jury, this did not justify the Court of Appeals in substituting its judgment for that of the jury because, being an appellate tribunal, it could not retry the facts. A difference in judicial opinion is not synonomous with an abuse of judicial discretion.

The defendant also contends that instruction 33 discussed in the opinion of the Court of Appeals was proper and responsive to the amended complaint. Instructions given to the jury and not excepted to become the law of

the case on appeal. Plaintiff's attorney brought and tried this case on the assumption the acts alleged to have been committed by defendant were malicious. Plaintiff is not entitled to another chance to try this case on a different theory. A reviewing court should accept the construction of the complaint made by the parties at the trial. The District Court did not commit any error of law on its rulings on instructions or on any other matter at the trial.

In the case at bar the plaintiff made no motion for a directed verdict and therefore is not in a position to deny that the judgment is supported by substantial evidence. In granting plaintiff a new trial, the Court of Appeals has circumvented and undermined this rule to such an extent that it is virtually meaningless.

The cases cited by the Court of Appeals do not support its conclusion.

I.

AN ORDER OVERRULING A MOTION FOR NEW TRIAL IS NEITHER APPEALABLE NOR REVIEWABLE.

The cases may be classified as follows:

(a) No Review on Ground the Verdict Is Against the Weight of the Evidence:

United States v. *Socony-Vacuum Oil Company*, 310 U. S. 150 at 247-48; *Moore* v. *United States*, 150 U. S. 57 at 61; *Boston & Maine Railroad* v. *Dutille, Admr.* (CA, 1st Cir.), 289 Fed. 320 at 324; *O'Donnell* v. *New York Transportation Company* (CA, 2nd Cir.), 187 Fed. 109 at 110.

(b) No Review Because a Motion for New Trial Rests in the Sound Discretion of the Trial Court.

Holmgren v. *United States,* 217 U. S. 509 at 521; *Newcomb* v. *Wood,* 97 U. S. 581 at 583; *The Indianapolis and St. Louis Railroad Company* v. *Horst,* 93 U. S. 291 at 301; *Schuhardt, et al.* v. *Allen, et al.,* 1 Wall 359 at 371; *Doswell* v. *De La Lanzo, et al.,* 20 Howard 29 at 32; *Frasca* v. *Howell, et al.* (CA, Dist. Col. Cir.), 182 Fed. 2d 703; *St. Louis Southwestern Railway Company* v. *Ferguson* (CA, 8th Cir.), 182 Fed. 2d 949 at 954; *Larsen* v. *Chicago & Northwestern Railway Company* (CA, 7th Cir.), 171 Fed. 2d 841 at 845; *McBride, et al. v. Neal* (CA, 7th Cir.), 214 Fed. 966 at 968.

(c) No Review on the Ground of Error of Fact.

United States of America v. *Johnson,* 327 U. S. 106 at 111; *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150 at 247; *Fairmount Glass Works* v. *Cub Fork Coal Company, et al.,* 287 U. S. 474 at 481; *Parsons* v. *Bedford,* 3 Peters 433 at 446; *The Maine Insurance Company of Alexandria* v. *Young,* 5 Cranch 187 at 190; *Cavness* v. *United States* (CA, 9th Cir.), 187 Fed. 2d 719 at 722.

(d) Generally:

Montgomery Ward & Company v. *Duncan,* 311 U. S. 243 at 253; *Kerr, et al.* v. *Clampitt, et al.,* 95 U. S. 188 at 189.

(e) The Only Exceptions to the Rule That an Order Overruling a Motion for New Trial Is Neither Appealable Nor Reviewable Are the Following:

(1) If the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion.

Mattox v. *United States,* 146 U. S. 140; *Ogden* v. *United States* (CA, 3rd Cir.), 112 Fed. 523 at 525.

(2) If the trial court acted on the mistaken view that there was no jurisdiction to grant a new trial or that there was no authority to grant it on the ground advanced.

> *Paine et al.* v. *St. Paul Union Stockyards Company* (CA, 8th Cir.), 35 Fed. 2d 624 at 626; *Dwyer* v. *United States* (CA, 9th Cir.), 170 Fed. 160 at 165; *Felton* v. *Spiro* (CA, 6th Cir.), 78 Fed. 576 at 581.

(3) An abuse of discretion analogous to an error of law and as such reviewable on appeal.

> *Virginian Railway Company* v. *Armentrout* (CA, 4th Cir.), 166 Fed. 2d 400 at 407; *Cobb* v. *Lepisto, et al.* (CA, 9th Cir.), 6 Fed. 2d 128 at 129.

II.

THE DECISION OF THE COURT OF APPEALS IN THE INSTANT CASE DOES NOT COME WITHIN ANY OF THE EXCEPTIONS ON WHICH THE DECIDED CASES REST.

(a) There Was No Abuse of Discretion by the Trial Court.

Judge John P. Barnes, the senior judge of the United States District Court for the Northern District of Illinois, who tried this case, was sympathetic to the plaintiff and gave her every opportunity to make out a case. In passing on her motion for a new trial, Judge Barnes said:

> "My state of mind is not such that I feel that I ought to set this verdict of the jury aside. Had I tried the case I would have found the defendant guilty and assessed a substantial sum. That is my state of mind. I am emotional sometimes, but not so emotional that I feel that I ought to set that verdict aside" (Rec. 256).

A very appropriate comment on what constitutes an abuse of judicial discretion is found in an early New York case.* An examination of the colloquy that took place between Judge Barnes and the attorney for the plaintiff on the hearing on plaintiff's motion for a new trial (R. 251-57) shows that Judge Barnes gave plaintiff's motion his conscientious and careful consideration. His conduct in overruling the motion was certainly neither arbitrary nor motivated by passion, prejudice or partiality. The Court of Appeals recognized this fact in its opinion (R. 284).

In considering plaintiff's appeal from the judgment of the District Court, it is undisputed that the Court of Appeals, sitting as a court of review, was without jurisdiction

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* In the case of *The People* v. *The New York Central Railroad Company*, 29 N. Y. 418, Justice Hogeboom, in a dissenting opinion, said at page 430:

"It has been said in some cases that this rule is subject to this qualification, that when the discretion shall appear to have been *abused*, the appellate forum may interfere. And there are cases holding that a gross and palpable abuse of discretion may be controlled and reversed. It has been doubted whether the power of review in such a case rests upon any very clear or firm foundation in the law, but I will assume it to exist. * * * The exercise of an honest judgment, however erroneous it may appear to be, is not an *abuse of discretion*. Abuse of discretion, and especially gross and palpable abuse of discretion, which are the terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. In none of these particulars, in my opinion, is there just cause for imputation against the judge who pronounced this decision. Independent of his high character and position, I can find nothing in the facts of the case which justly exposes him to censure in these respects. He may have erred in judgment. It is not our province, I think, to determine whether he did so or not. It is quite possible many or any of us would not have reached the same precise conclusion. But this is not and cannot be the question. The question is, has his discretion been *abused*—has the result arrived at by him been produced by the exercise of an arbitrary and unlawful discretion? * * *"

to retry this action and to enter the judgment which it thought should have been entered in the trial court. *Emanuel* v. *Kansas City Title & Trust Company, et al.* (CA, 8th Cir.), 127 Fed. 2d 175 at 176; *Skinner* v. *Pennsylvania Greyhound Lines, Inc.* (CA, 7th Cir.), 123 Fed. 2d 497 at 498; *Swinger* v. *Firman Equipment Corporation* (CA, 7th Cir.), 94 Fed. 269 at 271. *Yet that is precisely what the Court of Appeals did.* Even though the Court of Appeals may have taken a different view of the evidence than the twelve jurors who saw the witnesses, observed their demeanor on the stand and heard them testify, nevertheless such circumstance would not of itself indicate that the trial court was guilty of an abuse of discretion in denying the motion of plaintiff for a new trial. As was aptly said by the Court of Errors and Appeals of New Jersey in *Day* v. *Donohue,* 41 Atl. 934 at 935:

> "* * * * 'difference in judicial opinion' is not synonomous with 'abuse of judicial discretion' * * *"

In *Fairmont Glass Works* v. *Cub Fork Coal Company, et al.,* 287 U. S. 474, this court, in an opinion by Mr. Justice Brandeis, said at page 481:

> "The rule that this court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; * * * The rule precludes likewise a review of such action by a circuit court of appeals. Its early formulation by this court was influenced by the mandate of the Judiciary Act of 1789, which provided in 22 that there should be 'no reversal in either (circuit or Supreme) court on such writ of error * * * for any error in fact.' Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' More frequently the reason given for

> the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court."

It is submitted that the Court of Appeals in the case at bar was without power to review an alleged error of fact, namely, the verdict of the jury in favor of the defendant. In the case of *Aetna Casualty & Surety Company* v. *Yeatts* (CA, 4th Cir.), 122 Fed. 2d 350, cited in the opinion below, the Court of Appeals, after discussing the power of a federal trial judge to set aside a verdict on a motion for new trial and the non-reviewability generally of an order granting or refusing a new trial by a court of appeals, made this significant statement at page 355:

> "While an examination of the record has led us to the conclusion that the trial judge might very properly have granted the motion for new trial, we cannot say that his denial of the motion amounted to an abuse of discretion on his part. * * *"

There are no facts or circumstances present upon which an abuse of discretion by the trial judge in the case at bar can be based.

(b) There Was No Error of Law in the District Court's Rulings on Instructions or on Any Other Matter.

The amended complaint consists of one count. In one paragraph it is alleged that the conductor, a detective employed by the defendant, and a military policeman called by the conductor, "wilfully, wantonly and maliciously, and with great force and violence, seized hold of the plaintiff and charged her with unlawfully riding in a railroad car with white people, and violently and in a rude and insulting manner, pulled and dragged the plaintiff out of her seat, assaulted and beat her and injured her, and pulled her away from her baggage and belongings, and forcibly ejected her from said train. * * *" (R. 11.)

In another paragraph, it is alleged that the defendant "assaulted and beat the plaintiff and then and there willfully and maliciously seized and laid hold of the plaintiff, and with great force and violence pulled and dragged her about, * * * and wrongfully held and imprisoned the plaintiff there against her will, and upon the specific and direct instructions of said conductor in charge of defendant's train in which plaintiff was riding, plaintiff was locked up in a dirty, filthy jail for a long space of time * * *." (R. 11.) It was also charged that the conductor "ordered the false charge of riding in a railroad coach with white people against her (plaintiff). * * *" (R. 11.)

In another paragraph, it is averred that defendant "directed, caused and procured the plaintiff to be imprisoned, restrained and confined in said dirty and unsanitary jail, and deprived her of her liberty for a long space of time without any reasonable or probable cause whatsoever and without any writ, warrant or legal process of any kind whatsoever for so doing, and against the will of the plaintiff". (R. 11, 12.)

In a following paragraph of the amended complaint, it is alleged "that all of the aforesaid acts committed by said defendant were malicious and in disregard of plaintiff's rights, and done for the specific purpose of injuring plaintiff; that malice is the gist of this action." (R. 12.)

At the conclusion of plaintiff's evidence, the motion of the defendant that the charges made in each of the foregoing paragraphs be dismissed was denied. (R. 27, 28.) The only instruction discussed in the opinion of the Court of Appeals was one known as Number 33. We cannot agree with the Court of Appeals that it is clear that plaintiff's attorney objected to this instruction. If any objection was made by him, it is found on page 243 of the record. It is difficult to find any intelligible objection from that col-

loquy. This instruction was responsive to the amended complaint. This instruction did not impose on plaintiff conditions of recovery not warranted by her complaint and evidence. The Court of Appeals does not hold this instruction erroneous in view of the allegations of the amended complaint, but says that inasmuch as plaintiff could have charged what that Court calls "simple assault, false arrest and imprisonment", *the instruction required her to prove more than was necessary if her pleadings had been otherwise.* What took place is found in the record at pages 254 and 255 in a colloquy between the trial judge and the attorney for the plaintiff while the motion for new trial was being considered. The attorney for the plaintiff refused to separate the charges. The attorney for the defendant offered separate instructions pertaining to "false arrest, false imprisonment and malicious prosecution." The District Judge felt that the plaintiff would be prejudiced by the jury hearing so many instructions ending with the phrase "then you will find the defendant not guilty." He thereupon indicated that he would give a single instruction covering the several charges set forth in the amended complaint. Instruction 33 was the result.

We think that the remarks of Mr. Justice Jackson in commenting on an action brought under the Federal Safety Appliance Act are appropriate.* In this case the attor-

* *Sarah O'Donnell, Adm.* v. *Elgin, Joliet and Eastern Railway Company,* 338 U. S. 384, at 391.

> "We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking. We think the unfortunately prolonged course of this litigation is in no small part due to the failure to heed the admonition well stated by the Court of Appeals of the Seventh Circuit in a similar case: 'Of course, it is not proper to plead different theories in the same paragraph, but it is not necessarily fatal especially when the adversary makes no objection.' * * * Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on

ney for the defendant sought to separate the causes of action as did the trial court. The responsibility for the scrambled pleadings rests on plaintiff's attorney. He certainly, therefore, is in no position to complaint about instruction 33, particularly when he made no specific objection thereto at the time of the trial.

The Court of Appeals also says that other instructions "requested by plaintiff or acquiesced in by her, appear to be misleading and confusing". An examination of the record shows that no instruction requested by plaintiff's attorney was refused by the District Court, although some of the tendered instructions were modified. (Tr. R. 610-14.) In the assignment of errors filed in this case by plaintiff's attorney, complaint was made of only one instruction given to the jury at the request of the defendant, namely Number 33. (R. 268-69.) The statement of the Court of Appeals is without foundation on this record.

It is well settled that instructions given by the Court to the jury and not excepted to by either party become the law of the case. *Rittgers* v. *United States* (CA, 8th Cir.), 154 Fed. 2d 768, at 772; *F. W. Woolworth Company* v. *Carriker, et al.* (CA, 8th Cir.), 107 Fed. 2d 689, at 692.

The Court of Appeals says that because of plaintiff's reliance on the charges of malice, "she failed to lay the groundwork for what we choose to call simple assault,

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negligence are set forth separately from those based on violation of the appliance acts.

"But no matter how the pleadings are allowed to stand, we think it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed. The trial court in this case submitted the whole indiscriminately as a negligence case. * * * But the scrambling of the claims in this case illustrates how much evidence may be admitted, submitted and considered on negligence issues that, under our repeated holdings, would be immaterial in case of violation of the Safety Appliance Acts."

false arrest and imprisonment on which action may be maintained irrespective of harm and without proof of 'personal hostility or desire to offend.' * * * The result was that under the instructions as given, including the one objected to, the jury had no alternative but to return its verdict for defendant if it disbelieved any part of her story, although the facts otherwise established actually spelled out a cause of action on which relief could well have been predicated." (R. 284.)

Plaintiff is not entitled to another chance to try this case on a different theory.

In *Houle* v. *Helena Gas & Electric Company,* 31 Fed. 2d 671, the United States Court of Appeals for the Ninth Circuit said at 672:

> "* * * This practical construction of the complaint accepted by the parties throughout the trial, will be accepted by this court. * * *"

In *Barnsdall Refining Corporation* v. *Cushman-Wilson Oil Company,* 97 Fed. 2d 481, the United States Court of Appeals for the Eighth Circuit said at 485:

> "* * * We must, on appeal, adhere to the theory on which the case was tried in the lower court. * * *"

Plaintiff chose to bring this action on the theory of malicious acts alleged to have been committed by the defendant's agents. Her evidence was to such effect. The instructions requested by plaintiff were to the same effect. The jury by its verdict said defendant was "not guilty" of malice. The trial judge refused to upset that verdict.

Plaintiff's attorney made an election. He sought to recover on charges of malice. He failed. Why shouldn't he be held to the choice he made? In *Woodbridge, et al.* v. *Du Pont, et al.* (CA, 2nd Cir.), 133 Fed. 2d 904, the Court

considered if it could review whether there was sufficient evidence to make a jury question, when such point had been raised on plaintiffs' motion for a new trial but the plaintiffs had made no motion for a directed verdict. That Court held it could not and at page 904 said:

> "So far as appears, *they (the plaintiffs) were content to gamble upon the result, and to reserve any right they had until after they had lost.* There is no just reason to relieve them of such choice, once deliberately made." (Italics supplied.)

The manifest unfairness of the holding of the Court of Appeals should also be pointed out. In giving plaintiff another chance, that Court does not say that a new trial shall be confined to a charge of simple assault, false arrest and imprisonment under amended pleadings. The charge of malice has been adjudicated in defendant's favor. Why should defendant be compelled to stand another trial on that charge? That Court is not only giving plaintiff another trial on the charges of "simple assault, false arrest and imprisonment," but is leaving plaintiff free to relitigate the charge of malicious assault, arrest and imprisonment against defendant.

(c) No Other Exception to the Rule That an Order Overruling a Motion for New Trial Is Neither Appealable Nor Reviewable on This Record Is Applicable.

The District Court considered plaintiff's motion for new trial. It did not exclude from consideration any matter which was appropriate to a decision on said motion. It did not deny such motion for the reason that it had no authority to grant it on the ground advanced.

III.

IN GRANTING PLAINTIFF A NEW TRIAL, THE COURT OF APPEALS DID BY INDIRECTION WHAT IT COULD NOT DO DIRECTLY.

Plaintiff made no motion for a directed verdict in the District Court. As the Court of Appeals correctly held, she is not in a position to deny that there is substantial evidence to support the verdict. *Edwards, et al.* v. *Craig* (CA, 7th Cir.), 138 Fed. 2d 608; *Harnik* v. *Lilley* (CA, 8th Cir.), 167 Fed. 2d 159 at 160; Barron and Holtzoff's Federal Practice and Procedure, Rules Edition, Volume 2, page 781.

It is a well settled principle of law that one cannot do by indirection what he cannot do directly. We submit that the opinion of the Court of Appeals does just this because, while foreclosing plaintiff from attacking the sufficiency of the evidence to support the verdict and judgment in question, nevertheless it considers the evidence in reviewing the order overruling her motion for a new trial. If plaintiff can accomplish by a motion for a new trial what she could have accomplished but failed to secure by a motion for a directed verdict, there is nothing left of the rule that the sufficiency of the evidence cannot be attacked upon appeal if a motion for a directed verdict is not made.

In *Kerr, et al.* v. *Clampitt, et al.*, 95 U. S. 188 at 189, this court said:

> "* * * We have no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, however meritorious the grounds presented for its consideration or erroneous its decision. *The final judgment cannot be examined through the rulings of the lower court upon that question.* If, therefore, when the final judgment is brought before us for review by writ of error, no other documents are presented for our consideration than such as were be-

fore the inferior court upon the application for a new trial, we cannot look into them; and if error is not otherwise disclosed by the record, the judgment must be affirmed. * * *'" (Italics supplied.)

IV.

THE CASES CITED IN THE OPINION OF THE COURT OF APPEALS DO NOT SUPPORT ITS CONCLUSION.

In *Aetna Casualty & Surety Company* v. *Yeatts*, 122 Fed. 2d 350, the United States Court of Appeals for the Fourth Circuit discussed the origin of the right of a trial judge to set aside a verdict of the jury and pointed out that it was a power exercised in pursuance of a sound judicial discretion. In discussing that point, that court commented on the power of a federal *trial* judge in like circumstances and concluded he had similar power. But the power of the federal *trial* judge to set aside a verdict and grant a new trial is *different* from the power of a federal *reviewing* court in the same situation. Although the court in the *Yeatts* case thought the trial judge might properly have granted a new trial, it refused to intervene. Certainly the *Yeatts* case is not an authority for the action of the Court of Appeals in this case.

The Court of Appeals also cites *Murphy, et al.* v. *United States District Court, etc., et al.*, 145 Fed. 2d 1018. In that case the District Court allowed a new trial more than 60 days after the filing of an intention to move for a new trial notwithstanding a California statutory provision specifying that "the power of the court to pass on motions for new trial shall expire 60 days from and after * * * filing of the notice of intention to move for a new trial."

The United States Court of Appeals for the Ninth Circuit said at page 1020:

"A Federal *District* Judge not only has the power

> and authority but is charged with the duty and responsibility to set aside the verdict of a jury and to grant a new trial when in his judgment and discretion the amount of compensation awarded is excessive. The granting of a new trial is discretionary with the court and subject to no fixed rule except a consideration of what is just. * * * (citing cases). To curb this authority and responsibility by enforcing the time limit prescribed by State statute would tend to encumber and defeat the administration of justice in this case." (Italics supplied.)

We do not perceive that the *Murphy* case is any authority for the award of a new trial by the Court of Appeals in the instant case.

The Court of Appeals also cites the case of *Virginian Railway Company* v. *Armentrout* (CA, 4th Cir.), 166 Fed. 2d 400. As heretofore shown this is one of the isolated cases representing an exception to the prevailing rule. The decision was predicated on the ground the trial judge was guilty of an abuse of discretion analogous to an error of law. We have heretofore pointed out that there was no abuse of discretion by the District Court in the present action in denying plaintiff's motion for a new trial.

Finally, this court cites the case of *Kotteakos, et al.* v. *United States of America,* 328 U. S. 750. An examination of the opinion in the *Kotteakos* case shows its complete inapplicability to the present action.

In that case the only question was whether defendants suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the government admitted proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure. Defendants were convicted under the general conspiracy section of the Criminal Code of conspiring to violate the provisions of the National Housing Act. The judgments of conviction were affirmed by the

United States Court of Appeals for the Second Circuit. This court granted certiorari because of the importance of the question to the administration of criminal justice in the federal courts. This court, in an opinion by Mr. Justice Rutledge, then points out the criticisms that had been made of the administration of criminal justice in the federal courts because of the seemingly large number of reversals on technical grounds and the steps taken to remedy the situation. The pronouncement quoted by the Court of Appeals from the opinion in the *Kotteakos* case was made in the light of the background of that case.

Conclusion.

For the reasons stated and on the basis of the argument herein made, it is respectfully submitted that this petition should be granted.

EDWARD R. ADAMS,
HERBERT C. DE YOUNG,
CHARLES F. WHITE,
Attorneys for Petitioner.

August, 1951.